Wells Enterprises, Inc. *and* Neal Thomas Kruckenberg *and* United Dairy Workers of Le Mars

United Dairy Workers of Le Mars *and* Neal Thomas Kruckenberg *and* Wells Enterprises, Inc. Cases 18–CA–150544 and 18–CB–153774

December 22, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On June 20, 2016, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondents filed exceptions and supporting briefs, the General Counsel and Charging Party filed answering briefs, and Respondent Wells Enterprises, Inc. filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, to amend the remedy, and to adopt the recommended Order as modified and set forth in full below.[2]

AMENDED REMEDY

We shall amend the judge's remedy to delete the requirements that Respondent Wells Enterprises cease recognition of the Respondent Union after the Respondents' current collective-bargaining agreement expires, and that the Respondents cease giving effect to certain provisions of their contract. We find that the cease-recognition remedy is not warranted under the circumstances here. See generally *Pacific Intermountain Express Co.*, 107 NLRB 837, 850 fn. 29 (1954) (noting that cease-recognition remedy "is discretionary with the Board" and "need not be applied where it would not effectuate the policies of the Act"). There is no showing here, for example, that the Respondent Union's ability to represent employees was adversely affected by the employer's unlawful assistance. See *Lykes Bros. Inc. of Georgia*, 128 NLRB 606, 611 (1960) (declining to order cease-recognition remedy).[3] Nor did it call into question the Respondent Union's majority status. See *Jeffrey Mfg. Co.*, 208 NLRB 75, 75 (1974) (declining to order cease-recognition remedy). We also find no basis for requiring the Respondents to cease giving effect to contract provisions that provide for union representatives to be compensated for their time in meetings with unit employees, as the violations herein solely concern the vending machine and micro-market commission arrangement and do not concern the union representatives' compensation. See generally *M. Eskin & Son*, 135 NLRB 666, 671 (1962) (declining to order the parties to cease giving effect to contract provisions, where "all the unfair labor practices for which this remedy was recommended occurred during the term of the [parties'] collective-bargaining contract, the execution and maintenance of which [were] not under attack"), enfd. 312 F.2d 108 (2d Cir. 1963). Accordingly, we find in these circumstances that requiring the Respondents to cease and desist from engaging in the unlawful commission arrangement, and to post notices to employees and members, will fully remedy the violations found and thereby effectuate the purposes of the Act.

[1] Respondent United Dairy Workers of Le Mars (Respondent Union) has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's findings that Respondent Wells Enterprises violated Sec. 8(a)(2) and (1) of the Act by providing the Respondent Union proceeds from vending machine and micro-market sales and that the Respondent Union violated Sec. 8(b)(1)(A) by accepting such financial support, we do not rely on his citations to *Mistletoe Express Service*, 295 NLRB 273 (1989), and *Jackson Engineering Co.*, 265 NLRB 1688 (1982), as those cases involved unlawful conduct that is fundamentally different from the conduct at issue here.

We deny the Charging Party's motion to strike Respondent Wells Enterprises' affidavit with attached letters dismissing the unfair labor practice charge in Case 18–CA–17549 and denying the appeal therefrom. We find, however, that any reliance by Respondent Wells Enterprises on the administrative dismissal of that unfair labor practice charge is misplaced, as an administrative dismissal does not constitute an adjudication on the merits. See, e.g., *Pepsi-Cola Bottlers of Atlanta*, 267 NLRB 1100, 1100 fn. 2 (1983).

[2] We shall modify the judge's recommended Order and substitute new notices to conform to the Board's standard remedial language and the remedy as amended.

[3] *The Post Publishing Co.*, 136 NLRB 272 (1962), enf. denied 311 F.2d 565 (7th Cir. 1962), cited in support by the judge, is distinguishable. In that case, the employer not only provided cafeteria and vending proceeds to the incumbent labor organization, it also unlawfully offered to pay the expenses of an attorney to represent the unit employees in negotiations. Further, after the employer expressed support for the incumbent union and its opposition to a rival union, employees who previously signed authorization cards for the rival union submitted a petition withdrawing their support for that union. In requiring the employer to cease recognition of the incumbent union, the Board found the circumstances warranted the conclusion that the incumbent union could not maintain its exclusive representative status without the employer's unlawful support and assistance. Id. at 273. Plainly, such circumstances are not present in this case.

ORDER

A. The National Labor Relations Board orders that the Respondent, Wells Enterprises, Inc., Le Mars, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Contributing financial support to the Union, United Dairy Workers of Le Mars, by providing proceeds from vending machine and micro-market sales at Wells Enterprises' facility to the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its Le Mars, Iowa facility copies of the attached notice marked "Appendix A."[4] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 21, 2014.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The National Labor Relations Board orders that the Respondent, United Dairy Workers of Le Mars, Le Mars, Iowa, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting financial support from Wells Enterprises, Inc. by receiving proceeds from vending machine and micro-market sales at its facility.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its Le Mars, Iowa office copies of the attached notice marked "Appendix B."[5] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with employees and members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 14 days after service by the Region, deliver to the Regional Director for Region 18 signed copies of the notice in sufficient number for posting by Wells Enterprises, Inc. at its Le Mars, Iowa facility, if it wishes, in all places where notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 22, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT contribute financial support to the Union, United Dairy Workers of Le Mars, by providing proceeds from vending machine and micro-market sales at our facility to the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WELLS ENTERPRISES, INC.

The Board's decision can be found at www.nlrb.gov/case/18-CA-150544 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT accept financial support from Wells Enterprises, Inc. by receiving proceeds from vending machine and micro-market sales at its facility.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

UNITED DAIRY WORKERS OF LE MARS

The Board's decision can be found at www.nlrb.gov/case/18-CA-150544 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Benjamin Mandelman, Esq., for the General Counsel.
M.H. Weinberg, Esq., of Omaha, Nebraska, for the Charging Party.
Robert C. Castle, Esq., of Minneapolis, Minnesota, for the Respondent Employer.
Daniel Hartnett, Esq., of Sioux City, Iowa, for the Respondent Union.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Sioux City, Iowa on February 23, 2016. The charge against Wells Enterprises, Inc. (Wells or the Employer) was filed by Neal Thomas Kruckenberg on April 21, 2015; and the charge against United Dairy Workers of Le Mars (the Union or the Employees Committee) was filed by Kruckenberg on June 8, 2015.[1] The consolidated complaint, issued on December 8, alleges that Wells at all material times and within the past 6 months has given assistance and support to the Union by forwarding funds derived from the operation of vending machines on Well's property to the Union constituting the Union's sole

[1] All dates are 2015 unless otherwise specified.

source of funding and Wells by this conduct has been rendering unlawful financial or other support to a labor organization in violation of Section 8(a)(2) and (1) of the Act, and that by the Union's receipt of those funds it has been restraining and coercing employees in violation of Section 8(b)(1)(A) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and Wells, I make the following:[2]

FINDINGS OF FACT

I. JURISDICTION

Wells Enterprises, Inc., a corporation with an office and place of business in Le Mars, Iowa (Wells' facility), has been engaged in the manufacture and the nonretail sale of frozen desserts. In conducting its operations during a representative 12 month period, Wells sold and shipped from Wells' facility goods valued in excess of $50,000 directly to points outside the state of Iowa. Respondents admit and I find that Wells is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Allen DeVos works as a warehouse tech for Wells and has worked there for over 30 years. DeVos testified that: Wells produces ice cream and ice cream related products. Wells operates a multi-building complex, including two ice cream plants, one called the north ice cream plant (NICP) and the other the south ice cream plant (SICP). Wells' complex also includes warehouses, an engineer building, and a freezer section connected to both the north and south plant. Wells employs about 1,565 employees who are represented by the Union, the name of which is United Dairy Workers of Le Mars. DeVos testified the Union is also known as the Employees Committee. DeVos has been an officer in the Union since 2009, and he has been the secretary and treasurer since April 2015. DeVos testified Kevin Christensen is the Union's president. In addition to Christensen and DeVos, there are three other union officers.

Kruckenberg, the charging party, signed off on a Department of Labor Form LM-1 on October 19, 2005 as the president of the Employee's Committee of Le Mars and Omaha. It stated it was the initial Form LM-1 filed by the organization. The form reported expected receipts were over $10,000. The form contained under the heading "Additional Information" the statement that:

> Our funds for the Committee is derived from 8% return from the vending machines in our plants. This was established by the Company in the 70's to benefit the plants for flowers for funerals, feeds for the employees, and to buy newspapers for the break rooms. Over time it evolved to become the Committee's money for said plants. We have filed taxes on these accounts over the years.

DeVos identified the Union's Department of Labor LM-3 forms for the period January 1, 2006 through December 31, 2014. He testified that during that time the Union did not have any regular dues or fees. DeVos testified "The only revenue we had was the commission on vending." Kruckenberg signed the Union's Form LM-3 reports as the Union's president for the years 2006, 2007, and 2008. The Form LM-3 for 2006 shows the name of the Union as the Employees Committee of LeMars and Omaha, with what appears to be vending earnings and earnings for the return of soda cans and plastic bottles totaling $23,757. As per the LM-3 forms: for the year 2007, the Union's receipts, other than interest and dividends, are listed at $21,747; for 2008, the Union's receipts other than interest and dividends are listed as $23,109. For 2009, the Union's other receipts were listed as $20,757; for 2010, the Union's name was changed to the United Dairy Workers of LeMars, and it appears the Union had receipts of about $8000; for 2011 the reported other receipts were $15,430; for 2012, the reported other receipts were $15,594; for 2013 the reported other receipts were $18,111; for 2014, the reported other receipts were $17,395. A position statement filed by Wells with the Region dated May 27 shows that for the first four months of 2015, the Union on average was earning over $2400 a month in vending and micro-market commissions, which would equal $28,800 on an annual basis. In fact, a Union expense sheet for January 1 through October 21, 2015 shows the Union received $25,644 in vending revenue from Chesterman the company that operates the vending machines and micro-markets at Wells. In the May 27 position statement, it was stated that Chesterman forwarded the Union's commission checks directly to the Union's president Curt Lang. The way the checks were paid to the Union reflects a recent change in the procedure because in a position statement from Wells to the Region dated April 14, it was stated, "Chesterman forwards checks, on a monthly basis to the Wells ice cream plants. The plants' respective administrative assistants forward those checks to the Committee's (Union's) current president."

DeVos testified the Union is funded by receiving an 8% commission from the sale of vending of snacks and products, not soda, from vending machines that represented employees use at Wells' facilities. However, DeVos testified there are unrepresented employees who work in the manufacturing facilities including secretaries, managers, and supervisors who also use the vending machines from which the Union gets its commission. DeVos testified there are vending machines in multiple break rooms and they are also micro-markets at the Wells facilities from which the Union also receives a commission for sales. DeVos explained the micro-markets have vending machines as well as fresh food products which can be picked up and self-scanned by the employees. DeVos testified the micro-markets operate with the use of video surveillance to prevent

[2] In making the findings, I have considered the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation,* 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). All testimony and evidence has been considered. If certain testimony or evidence is not mentioned it is because it is cumulative of the credited evidence, not credited, or not essential to the findings herein.

theft.

DeVos testified Chesterman Co. (Chesterman) is the ultimate owner of the vending company. DeVos identified a series of monthly "Commission Statements" mostly for the year 2014 that the Union received with their checks for vending from Premium Food and Beverage, which DeVos testified is owned by Chesterman. The document shows the commission was eight percent; the checks listed were made out to Wells Dairy SICP. While the checks were made out to Wells Dairy SICP, the credit union deposit slips show the full amount was deposited in the Union's account. The "Commission Statements" show for the month of December 2013, the Union received $1,199.87; and for the month January 2014, the Union received $1,375.11. DeVos testified the checks were not endorsed when they went into the Union's credit union account. In May 2014, in addition to the monthly vending commission the Union received in the amount of $1,115.01; the Union received another statement in the amount of $615.30 as a "Premium Markets Commission," which DeVos described as a site containing open vending referred to as micro-markets. DeVos testified the Union also receives eight percent of the proceeds for the sales at the micro-markets. DeVos identified three checks from Chesterman dated May 14, 2015 that the Union received. One is made out to Wells Dairy SICP North Freezer in the amount of $345.66; another is made out to Wells Dairy-SICP in the amount of $641.16; and the third is made out to Wells Dairy NICP Freezer in the amount of $103.39 totaling $1090.21. DeVos testified that he did not know if the three checks represented the total payment the Union received for that month. On the back of the exhibit containing the three checks is a N.W. Iowa Credit Union receipt dated May 21, containing the Union's name with a check deposit amount of $2,800.31 which is listed as the transaction amount.

However, DeVos testified the Chesterman vending checks are currently are sent directly to the Union's post office box. DeVos testified these checks are no longer made out to Wells but are made out to United Dairy Workers of Le Mars, attention Al DeVos. DeVos testified the checks began to be made out to the Union after he became treasurer in June 2015. Prior to that, the checks were made out to Wells, but the Union still deposited them in the Union's account. DeVos testified he takes the checks to the N.W. Iowa Credit Union and hands them to Brenda Gengler the account manager there, who deposits the checks into the Union's account. DeVos testified Gengler followed this procedure even during the time the checks were made out to Wells rather than the Union.

DeVos testified the Union does not have a checking account; it only has a savings account. He testified he brings the Union's bills to Gengler, who manages the Union's credit union account. The credit union then pays the bills and deducts the amount from the Union's savings account. The credit union charges a bookkeeping fee for this service. The Union's expenses include newspapers which they leave in all the represented employees' break rooms. There are also gift card expenses listed in 2014 and 2015, which DeVos testified were being investigated by the Department of Labor. He testified, "We believe there was misuse of funds by a union representative. I do not know what the gift cards were for. It is under an investigation by the Department of Labor." DeVos testified the individual who purchased the gift cards is no longer a union officer. The record contains the Union's expense sheets for the years 2014 and 2015. DeVos testified Gengler prepares these documents. The Union's expense sheet for 2014, showed a balance of $34,957.55 at the end of 2013, with deposits totaling $17,395.44. For 2014, all of the deposits, save for $475, came from Chesterman from vending machine sales. Thus, in 2014 there was $16,920 in vending income. For 2014, the Union reported $17,742.18 in expenses. Included in the expenses were $12,908 for gift cards and gift card fees; and $3587.68 in newspapers for the bargaining unit. Thus, $16,495.68 were spent on some type of gifts in the form of gift cards or newspapers, leaving $415 of the vending income to be spent on non-gift expenses. The Union's 2015 expense sheet running through October 21, 2015 showed a balance of $34,700.20 at the end of 2014. It showed for 2015 running through October 21, $25,649.56 vending income from Chesterman. During that period, the Union spent $5295 for gift cards, and gift card fees, $2671.98 for newspapers, and $11,104.37 in what was labeled as attorney fees or payments to a law firm. The expenditures for these three items totaled $19071.31, or 74 percent of the Union's vending income. DeVos testified the legal fees related to the NLRB and Department of Labor investigations. DeVos testified the vending funds were received from the eight percent revenue the Union receives from the vending machine sales. He testified in 2014, the Union was also receiving a 5 percent can redemption amount. DeVos testified that after he became treasurer the Union stopped receiving funds for recycled cans.

DeVos testified the Union has no contractual relationship with Chesterman or any of its subsidiaries. He testified he thought Wells has such a relationship with Chesterman. DeVos testified the Union does not negotiate any terms with Chesterman, like price, equipment, or services to be provided. DeVos testified the Union does not provide any services to Chesterman. The record contains a written agreement between Wells and Chesterman dated April 8, 2014. The contract was signed for Wells by Debra McCannon, facilities manager. DeVos testified he has never seen the agreement between Chesterman and Wells. He testified that when they went to a micro-market system Wells brought the agreement to the Union to discuss it. However, DeVos testified he was not involved in a discussion with Chesterman.

DeVos testified since he has become a union officer he has not attended a union meeting where they discussed vending. He testified the Union currently has a post office box, and the vending receipts are sent by Chesterman directly to the post office box. Prior to that the Union's mailing address was the address of the secretary or the treasurer. DeVos testified that when he became the treasurer and secretary, the Union began the use the post office box. DeVos testified the Union changed that in order to be able to receive NLRB documents. DeVos testified before the Union obtained the post office box the vending checks were sent to an administrative person employed by Wells. DeVos testified until he opened the post office box the vending checks were handed to him by a Wells secretary, or DeVos received them unopened through interoffice mail. DeVos testified the Union's name first appeared on the vending

checks "Right after I became treasurer. June 2015, or shortly thereafter." DeVos testified the Union did not change the check procedure through a direct contact with Chesterman. Rather, Wells had the procedure changed with Chesterman by passing on the procedure the Union wanted which was to have the checks sent to the Union's post office box. DeVos testified that he did have contacts with Chesterman about this. DeVos testified a lot of the changes were the result of a Department of Labor investigation, "But I have had direct contact with Chesterman." DeVos testified he suggested the change in the procedure to Wells and Wells forwarded it to Chesterman. He testified it was the Union's suggestion and the Employer dealt with Chesterman and arranged it.[3]

On the morning of November 24, Jeremy DeLaughter, the director of HR for operations for Wells, sent DeVos and Christensen an email with the Subject: "EC letter regarding PO Box, funding, etc." In the email DeLaughter stated to DeVos, "As discussed yesterday, could you provide me with a letter from the EC Officers, either you as Secretary or Kevin as President that covers the following information:

- The fact that you receive checks directly from Chesterman's not Wells.
- The fact that checks are sent directly to the EC PO Box and deposited by the EC.
- The fact that the EC no longer receives the proceeds of can/bottle deposits.
- The fact that you don't share the amounts of the checks from Chesterman's with Wells.

DeVos responded by email that afternoon stating he was working on it and asking, "Do you also want me to include that the vending commission we receive is only for machines in represented work places?" To which DeLaughter replied that would be helpful. Shortly thereafter on November 24, DeVos wrote to DeLaughter, "Here is what I have. If you would like changes, revisions or word smithing just tell me what you need." DeLaughter wrote back on November 24, "I made just a couple of small corrections. I removed the phrase 'very few represented employees' and just left it as you don't receive commission from areas where there aren't represented employees." On the morning of November 30, DeLaughter emailed DeVos that DeLaughter had to make another correction. He stated, "Can you re-sign this attached version and email it back to me?"

DeVos signed the memo, dated November 30, 2015 to DeLaughter. The memo states it provides an outline of how the vending commission from Chesterman to the Union works. The memo states the Union receives a commission on all sales from vending in areas that represented workers of the Union use, and that the Union does not receive any commissions from areas that do not have represented workers. It states that "Monthly, Chesterman sends commission checks" to the Union, which are made out to the Union as payee on the check, and are mailed to the Union's P.O. box. It states, "At no time, does Wells Enterprises see or have any knowledge of the size or amount of the checks." DeVos testified he wrote the memo at DeLaughter's request, and there was no prior written procedure he was aware of describing the process prior to DeVos November 30 memo. DeVos testified he thought the request for the memo came from DeLaughter's attorney.

DeVos testified the Union does not have an office, and when the Union holds meetings it rents a room. He testified there are monthly meetings with the Union's 12 union reps who are akin to stewards. These meetings take place in a rented hotel room, or at the Le Mars public library. DeVos testified the Union has bylaws, which by their terms were last amended in August 2015. DeVos testified the first set of bylaws was in effect 2005 when the Union became a union. DeVos testified there is no procedure for becoming a union member. Rather, the collective-bargaining agreement (CBA) defines who the union represented employees are. DeVos testified that, as per the CBA, once someone becomes a full time employee in the defined unit they are considered a represented employee by the Union. He testified the Union has no membership card, no initiation fees, dues, or assessments. DeVos testified that during his 30 years working for Wells there has never been dues, initiation fees or assessments. DeVos testified there is no form that would authorize the deduction of dues or the assignment of dues to the Union, and that although the CBA allows for the negotiation of a dues checkoff provision, the Union never sought one with Wells. DeVos testified all 1,565 employees in the bargaining unit are automatically members of the Union, and they are represented when they reach full time status.

DeVos testified there are certification papers for the Union dated December 19, 2005. However, DeVos did not know how the Union was certified, and he did not recall there being a vote for the Union. While DeVos testified he is not paid for the work he does for the Union by the Employer, as per the CBA in effect at the time of the trial, the Union officers receive 1 hour paid time from the Employer to meet after the monthly held joint Union-Employer meeting. DeVos testified the pay is for a meeting between the Union officers to discuss what was discussed with management at the prior meeting. The CBA also provides the Employer will provide 5 paid hours a week to be used at the discretion of the union president to conduct union business. The CBA states that:

> 2. Both parties agree that the purpose of this paid time is for the officers of the Employee Committee to meet with employees and start building relationships and trust between the employees and the EC. Additionally, it is agreed that this

[3] I did not find this aspect of DeVos testimony to be very convincing. The correspondence between Wells and Chesterman, as well as between Wells and the Union suggests the change in having the checks made out to the Union were a direct response to the current unfair labor practice charge, and that Wells not the Union controlled the contract with Chesterman and was the instigator of the change. In addition to the referenced correspondence, there was no evidence of any correspondence between the Union and Chesterman other than the Union's receipt of the checks. Moreover, Jesse Vondrak, Chesterman's sales representative testified all of his contacts were with Wells officials not the Union. Thus, Vondrak did not confirm DeVos claims of direct contact between Chesterman and the Union. Noting that that DeVos gave little information as to who his purported contacts with Chesterman were with and that he failed give dates or the name of the official, and considering his demeanor as to this aspect of his testimony, I do not find the record supports his claims here.

> time should also be used to develop a regular communications channel back to employees through postings, floor walks, and regular employee meetings. This time is not to be used to resolve or work on grievance issues, nor prepare for negotiations.

The CBA also provides that "The Company will provide the EC with the opportunity to meet with full-time regular new hires or rehires for purposes of explaining the roles and responsibilities of the Employee Committee." It states the Employer "will provide paid time, not to exceed 30 minutes, for EC members to conduct an orientation meeting." DeVos testified the Union carries out an orientation or educational function for new hires at Wells. DeVos explained that when an employee becomes full time, there is an orientation process during which the Union has 45 minutes to talk about the Union with the employees. DeVos testified that for the 45 minute orientation the union rep is not paid, but the employees are. DeVos testified the union rep is usually off duty. He then testified he did not know if it was during the employee's regular work day. DeVos testified, "If the employee was required to be there, I would suspect they are paid. I do not know if they're required to be there." DeVos testified he did not know if the employees are paid stating, "They might be."

DeVos testified the Union last negotiated a CBA with Wells in 2013, and the process took about 4 months because the first agreement was voted down. He testified the union officers, during the 4 month period, were meeting with the Employer 5 days a week and usually 2 days per week they were working on things amongst themselves pertaining to the negotiations. DeVos testified the meetings were held offsite, but it was during basic work hours. DeVos testified the Union officers were paid for the time spent during the meetings. DeVos testified when the parties achieved a tentative agreement, the Union held meetings with all employees, which were open meetings throughout the day. He testified the Union held from 8 to 10 meetings for 2 or 3 days, in which they answered questions before going to a vote. He testified the meetings were held off of Wells' property in a room paid for by the Union. DeVos testified the majority of employees voted to ratify the second proposed contract. DeVos testified Wells is not involved in the Union's contract ratification process. DeVos testified that on two or three occasions the employees have refused to ratify a tentative agreement. Once since DeVos has been an officer and the other times prior to that time.

DeVos testified Wells does not determine: who serves on the Union's negotiating committee; when the Union holds its meetings; who the Union selects as attorneys or its accountant. DeVos testified Wells does not provide the Union with computers or other technical related equipment. He testified Wells does not provide the Union with secretarial support, or office space at Wells facilities. DeVos testified the Union does not report to Wells how much revenue the Union receives from Chesterman; and Wells does not inquire as to the amount from the Union. DeVos testified Wells has not provided additional funding to the Union beyond the revenue provided by Chesterman. As set forth above, as per terms forth in the CBA, this does not appear to be an accurate statement, as well as DeVos' testimony that the Union officials were paid for attending negotiation sessions.

The Union's list of representatives for 2016 showed it has five officers, a president, a senior vice president, two vice presidents and a secretary/treasurer along with 13 union reps. DeVos testified a union representative is the same as a union steward. DeVos testified the union reps and officers are selected by a vote by the employees. DeVos testified the union officers meet at least monthly, and more often if necessary. DeVos testified the Union handles dozens of grievances a year on an informal basis. He testified if the grievance involves discipline, the Union is given time to explain the grievance procedure with just the employee present, ask them if they would like to file a grievance, and supply them with the forms. DeVos testified other times, employees come directly to the Union to discuss things, and the Union explains the grievance procedure to them. He testified most times, an employee comes to the Union and they take the matter right to management and everything is solved to the employee's satisfaction before a grievance is actually filed. DeVos testified if the employee is not fully satisfied, they have the option of filing a grievance. DeVos testified the CBA includes steps to follow for formal grievances including arbitration. DeVos testified no grievance has gone to arbitration. DeVos testified Wells has never refused to resolve a dispute through the grievance and arbitration procedure. DeVos testified Wells has resolved grievances to the Unions satisfaction. DeVos gave a recent example where an employee was going to be terminated. He testified the Union filed a grievance, and the employee received a 1-day suspension but was not terminated. DeVos testified there was also a grievance where the employee was terminated, the Union filed a grievance and got his job back. The employee refused the terms. The Union went back to Wells a couple of times, and the employee still refused the terms. The employee then filed a charge against the Union with the NLRB. DeVos testified soon after the Union filed its response the charge was dropped.

Jeremy DeLaughter has been the director of HR for operations for Wells since November 2014. Prior to that time, DeLaughter held two different HR positions at Wells. DeLaughter has been involved in collective bargaining and in the grievance procedure for Wells. DeLaughter testified the last two CBA's with the Union do not contain any provisions for Chesterman providing vending machine proceeds to the Union. The parties stipulated that Wells receives an eight percent commission from Chesterman for vending purchases at Wells corporate headquarters. This payment is separate from the eight percent commission that is sent to the Union for areas in which the bargaining unit employees work. DeLaughter testified Wells furnishes Chesterman and its vending subsidiaries access to the Wells property, including space for their equipment and vending, furnishes them electricity, lighting and heat. DeLaughter testified he believes the Union's only source of revenue is the funding from Chesterman. He testified that Wells, to his knowledge, has not received any authorization from employees that they want the eight percent commission to go to the Union. DeLaughter testified there is no claim by Wells that the Union owns any of the property, or pays any rent

at the facility. DeLaughter testified to his knowledge, employees have never objected to the eight percent commission going to the Union. DeLaughter testified Kruckenberg also did not object. DeLaughter testified Debra McCannon is the facilities manager for Wells.

DeLaughter testified that in his capacity as director of human resources for Wells he is not in any way involved in Wells' relationship with Chesterman. DeLaughter testified he did not know how much on a monthly basis during 2015 Chesterman forwarded to the Union from revenue which they collected from vending machines and micro-markets located in the manufacturing facilities. However, DeLaughter also testified he did see reports from Chesterman regarding how much they forwarded to the Union during that period of time during the investigation of this case. DeLaughter testified apart from information he gathered to respond to the unfair labor practice charge he did not independently receive reports from Chesterman regarding how much it sent to the Union.

DeLaughter testified he had no role in drafting the Union's March 2014 bylaws. He testified he has never appointed anyone to serve as a union officer, steward, or on the Union's negotiating committee. DeLaughter testified he has not participated in the Union's process for CBA ratification. DeLaughter testified he has never provided the Union with technical support such as computers, laptops, tablets, iPhones, scanners, and fax machines. DeLaughter testified he has never reimbursed any steward, officer, or negotiating committee member for expenses such as meeting room expenses, secretarial support, or travel expenses.

Jesse Vondrak works for Chesterman as a sales representative. He testified Premium Food and Beverage (PFD) is the full-line vending subsidiary of Chesterman. For purposes of this decision PFD and Chesterman will jointly be referred to as Chesterman. Vondrak testified he has worked for Chesterman for approximately 17 years. Vondrak testified he was not aware of any joint ownership between Chesterman and Wells. Vondrak testified that as a sales representative for Chesterman he has interaction with Wells, and that primarily his interaction is with McCannon, who is Chesterman's primary contact with Wells for the vending services. Vondrak testified McCannon oversees the Wells' facilities.

Vondrak testified the process beginning in January 2014 for vending and micro-market purchases at Wells is that Chesterman tabulated the receipts on a monthly basis. He explained that at the end of every month reports are run to calculate the percentage of commissions, which is an eight percent commission on snack and food items. Those checks are generated and then distributed to the customer. Vondrak testified in the January 2014 timeframe all of the plant sales revenue would get calculated into one check. Vondrak testified he thought the check was sent to the Wells SICP. Vondrak testified they started to install the micro-markets in April 2014, and that would have been at the NICP. Vondrak testified that, at that point, they began to issue a separate check for the micro-markets which was addressed to the NICP. He testified the commissions for the other Wells vending locations were still being combined into a check and sent to the SICP. Vondrak identified a vending commission check dated February 12, 2014, with the payer listed as Chesterman in the amount of $1375.12 made out to Wells SICP. When asked why the check was made out to Wells SICP, Vondrak testified that he had been overseeing the commission procedure since 2009, off and on. He testified that since he was doing this in 2009, that was how the checks were always addressed, and they were all sent to a central location. He testified he thought the checks being sent to a central location was something agreed upon between Wells and Chesterman. Vondrak testified he did not know what happened to the checks after they were sent to the central location stating, "That's kind of really none of our business. We just kind of try to stay out of that part." However, Vondrak was then asked concerning the period between January 2014 and June of 2015 if he had stated everything he understood "about the process through which Chesterman collected money from vending machines, processed it, and then forwarded it to the Employee's Committee?" To which Vondrak replied, "Yes, I have." Thus, Vondrak was aware the checks were addressed to and sent to Wells, after which Wells turned the commissions over to the Union. Vondrak identified three checks from Chesterman dated May 14, 2015, one in the amount of $345.66 addressed to Wells Dairy SICP North Freezer. He explained this check was for micro-market. Another check with the same date was addressed to Wells Dairy SICP; and the third check was addressed to Wells Dairy NICP Freezer. Vondrak testified that in May 2015 they were sending individual commission checks out to the different Wells facilities.

On April 21, Kruckenberg filed the unfair labor practice charge in this case against Wells. On May 21, McCannon sent an email addressed to Vondrak and Chesterman General Manager Ken Hagestrom, who is Vondrak' supervisor. In the email, McCannon asked Vondrak to send her as quickly as possible, "An accounting of vending sales and payments by location since January 1, 2014 (on a monthly basis), including:" the amounts kept by Wells; the amounts the vendor sent to Wells for non-corporate-headquarter vending machines; and the amounts Wells forwarded to the Employee Committee. Vondrak responded on May 21 stating "Attached is the commission information for 2014 and for 2015 Year to Date." He stated, "We do not have any information as to where the money was distributed after the commission checks were sent out… such as the amounts kept by Wells or the amounts Wells forwarded to the Employee Committee. The only information we have is the amounts of the commissions that were sent out along with where the check was issued to."

On June 25, McCannon sent Vondrak an email, stating, "Effective immediately, please make the following changes with respect to any and all commission checks payable by Chesterman in connection with the vending machines placed by Chesterman at non-corporate facilities owned by Wells Enterprises, Inc." Vondrak was told to make such checks payable to "United Dairy Workers of Le Mars;" to eliminate any references to Wells, Wells Enterprises, Inc., and Wells Dairy, Inc. on the checks. Vondrak was instructed to mail such checks directly to United Dairy Workers of Le Mars to the attention of DeVos at the listed post office box contained in McCannon's email. Vondrak responded to McCannon by email dated June 26 wherein he listed some questions. One of which was, "Do you

want us to continue to provide you with a month by month report on the commissions sent out which will show the amounts for each location?" Vondrak also asked for "As far as negotiating any future commission changes, pricing changes, vending/market program changes, will we continue to work with you on these matters or will we need to be in contact with the" Union's representative? McCannon replied by email dated July 1, wherein she stated that Wells does not want any commission reports for the amounts paid to the Union. She stated, "We expect to contact you within the next couple of months with a process for negotiating these issues."

Vondrak testified there was a change in the commission distribution process in June 2015. Vondrak testified Chesterman received instructions from Wells that the commission checks needed to be forwarded to the United Dairy Workers of Le Mars moving forward, instead of being addressed to all the different Wells locations to which they were being sent. Vondrak testified that McCannon did not explain why she wanted the change. He testified that beginning in June 2015 all of the vending commissions were combined into two separate checks both were issued to the Union. One was for the vending machines only. The other was a combination of all the micro-market locations which Chesterman serviced, excluding the corporate office. Vondrak testified, "Since I have been doing this, we've never included the corporate office commissions in with the plant commissions. That's always been a separate check issued to Wells." Vondrak explained the corporate office commissions are sent directly to the Wells corporate office. Vondrak testified Chesterman issues a separate check to the corporate office, but that is only for sales run through the corporate office. The check is made out to Wells Dairy Corporate and it is for a commission for sales at the micro-markets and the vending machines located in the Wells corporate office. Vondrak testified McCannon is the person that signed Chesterman's contract with Wells. He testified that if she had said "Please make all checks payable to Wells Enterprises, Inc.," he would have conformed to her request. Vondrak testified he followed McCannon's instructions as to who to send the checks to. Vondrak testified the agreement on the eight percent commission was done solely with McCannon and it was not done with the Union.

On November 23, McCannon sent Vondrak an email stating that by November 25, she needed a letter on Chesterman letter head explaining a detailed description of the flow of funds from employee purchases at vending machines to payment of funds to the Union, ownership of the vending machines, that Chesterman does not provide any reporting to Wells with respect to monies collected from the vending machines or paid to the Union, that Chesterman remits funds to the Union at the post office box owned by the Union. On November 23, Vondrak sent a draft three page letter to McCannon in response to her request. Vondrak's draft was dated November 23. On December 2, McCannon sent a revision of Vondrak's draft to him. McCannon's revision of Vondrak's draft contained the date November 30. On December 3, Vondrak sent McCannon an email, stating "I have signed the letter which you had sent back to us, scanned it, and attached it to this email. Let me know if you need anything else from me." Vondrak signed the revised version provided to him by McCannon as it was sent including the November 30 date. The memo is addressed to: "To Whom It May Concern."

The Vondrak memo, dated November 30, states "this letter pertains to the flow of the money which Wells employees use for the product purchases from Premium Food and Beverage (which is owned by Chesterman Co.) vending and micro-market equipment, to the" Union. Included in the description is that Wells' employees make purchases through one of the vending or micro-market locations which Premium has placed throughout the Wells' facilities. Premium, on a monthly basis calculates based on sales the commissions which are sent to the Union. The memo states that all vending and micro-market equipment placed at Wells is the property of Premium. The memo states Premium does not report to Wells regarding the funds collected; and no reports are shared with Wells which show the amount of funds which Premium forwards to the Union. The memo states all monthly commission statements and checks in regard to the vending and micro-market sales are issued exclusively to the Union listing the name United Dairy Workers of LeMars, to the attention of DeVos, with a listed post office box.

On December 18, Vondrak emailed McCannon, stating that Chesterman would like to set up a meeting in early to mid-January to discuss pricing adjustments for the upcoming year for both the micro-markets and the vending machines. He stated they received numerous price increases from their suppliers and have to address passing those on to the consumers. He stated, "Also, we would like to discuss the situation regarding the Employee's Committee and determine what information can and cannot be shared with Wells' and the Employee Committee. We are more than happy to provide requested reports, but we do not want to get stuck in the middle should we provide information that we aren't supposed to (in regards to the letter which was composed outlining the vending process at Wells')." On December 22, McCannon wrote back, "I have a meeting scheduled in January to review your questions below and get you a better explanation. For now… You can pass any reports related to the corporate market and vending to me or Tanya. Any reports associated with the markets and vending at the plants would continue to go directly to the Employee Committee. Wells does not need to see any of the plant vending information."

A. Analysis

Section 8(a)(2) of the Act provides that "it shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay. In *Electromation, Inc.,* 309 NLRB 990, 996 (1992), enfd. 35 F.3d 1138 (7th Cir. 1994), the Board concerning Section 8(a)(2) stated that:

> …our inquiry is two-fold. First, we inquire whether the entity that is the object of the employer's allegedly unlawful conduct satisfies the definitional elements of Section 2(5) as to (1)

> employee participation, (2) a purpose to deal with employers, (3) concerning itself with conditions of employment or other statutory subjects, and (4) if an "employee representation committee or plan" is involved, evidence that the committee is in some way representing the employees. Second, if the organization satisfies those criteria, we consider whether the employer has engaged in any of the three forms of conduct proscribed by Section 8(a)(2).

In *Post Publishing Company,* 136 NLRB 272, 273 (1962), enf. denied 311 F.2d 565 (7th Cir. 1962), the Board majority stated in the remedy section of its decision that:

> We agree with the Trial Examiner that an order requiring Respondent to withdraw and withhold recognition from the PCCU until and unless it is certified as the exclusive representative of the employees in the Respondent's mechanical departments is necessary to remedy the unfair labor practices found herein. The facts of the case demonstrate that, for almost the entire period of the PCCU's existence, the Respondent has been furnishing virtually all of the financial support necessary to carry out its functions. The record further demonstrates that at a meeting called by the Employer to discuss employee grievances which the Respondent viewed as the reason behind the organizational drive being made by the ITU, the Respondent unlawfully offered to pay the expenses of an attorney to represent the employees in bargaining negotiations. That offer was made in response to employee expressions of doubt as to the benefits of negotiating with the Respondent under the old system. At the same meeting the Respondent expressed its opposition to the ITU and its preference for dealing with PCCU. Sometime after this meeting, employees, who had signed authorization cards on behalf of the ITU, submitted a formal petition of withdrawal to the ITU.
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> In our opinion, the above-circumstances warrant a conclusion that PCCU cannot maintain its exclusive representative status without the Respondent's unlawful support and assistance. While it is true, as Member Rodgers points out, that there has been no criticism or suspicion cast upon Respondent's relations to the PCCU until the issuance of the instant complaint, this is not a ground for ignoring the evidence adduced now before us. Accordingly, we shall provide a remedy which will enable the employees freely to select or reject, as the case may be, the PCCU as their exclusive representative.

The Board's Order in *Post Publishing* included withdrawing recognition from the union and to cease giving effect to any contract with that union.

The Trial Examiner noted in *Post Publishing* that the, "General Counsel claims Respondent has given unlawful assistance and support to the PCCU by (1) allowing it to hold meetings on company property, and to print meeting notices on company time and with use of company machinery; (2) permitting the PCCU to engage in union activities on company time and property; (3) donating the proceeds of coffee vending machines to the PCCU, and (4) allowing it to use the profits from the company cafeteria for the benefit of its members." *Id.* at 279. It was noted that when a cafeteria was installed in 1952, certain employees asked the respondent to let them run it, the respondent consented and appointed a PCCU member as cafeteria director. This individual operated the cafeteria until March 1961 when he retired. The respondent exercised no control or supervision over his operation of the cafeteria, and paid him nothing for it; his sole compensation for that work was 10 percent of the profits, which he received by arrangement with the PCCU. Shortly after he became manager, respondent told the individual the PCCU could take the cafeteria profits and since that time those profits, amounting to about $600 per year, have been used by the cafeteria director mainly to defray the costs of refreshments served at PCCU meetings and at its annual Christmas parties. In addition, cafeteria personnel used its food stocks to serve refreshments at some PCCU meetings. Since the employee's retirement another employee in like manner continued to manage the cafeteria and disburse its funds for the benefit of the PCCU. In 1959, when employees spoke about dissatisfaction with a coffee vending machine, the respondent allowed them to procure the type they wanted, permitted its installation, and has then turned over all checks representing its share of the profits from it to the PCCU treasurer who deposited them in the PCCU savings bank account. Between January 30, 1959, and June 16, 1961, the only deposits in that account, totaling about $237, represented checks from the distributor made out to the respondent employer but deposited to the credit of PCCU. It was stated that for a time during 1955 and 1956, the PCCU had in like manner received the profits averaging about $20 every 2 months from a prior coffee machine. It was noted that the respondent admittedly controlled the installation and continuance of such machines on its property, and the proceeds from the concession have always been payable in the first instance to it, and since these machines are used by all employees, it is obvious that respondent has in effect donated its profits from this source to the PCCU, as in the case of the cafeteria profits.

The Trial Examiner stated, "If the grant of the cafeteria for meetings after workhours, and acquiescence in occasional use of company time and equipment for preparing and posting union notices and soliciting signatures for a petition were the only acts of 'courtesy or generosity' involved in the case, I would be inclined to agree with Respondent that this type of 'support' did not amount to a violation of the Act." The Trial Examiner went on to state, "However, Respondent's financial assistance to the PCCU was of such a nature and extent that, in my opinion, it amounted to unlawful assistance and support, it allowed the PCCU to eliminate the collection of dues, and largely eliminate initiation fees." The respondent in the most recent carnation there was giving the PCCU $600 a year cafeteria profits; and about $237 a year coffee vending machine profits. It was noted that from January 1959 onward, PCCU has received roughly $700 a year from these sources from respondent as against less than $15 a year from initiation fees. It was stated:

> It is clear from these facts that well over 95 percent of the money used by the PCCU in its normal operations since 1959 has come from operations controlled by Respondent.[15] Respondent has thus almost completely subsidized the operations of the PCCU to such an extent that it has never run into debt, but has always had a surplus fund. This subsidy has not been a matter of general or casual benevolence of Respondent

> toward all employees, but has been consciously afforded to the PCCU alone, for the record shows that the proceeds from the cafeteria and coffee machine have come from use of those facilities by about 175 employees, but the net income has been given to and used by the PCCU for the benefit only of its members, who constitute about a third of the entire company payroll.[16] I find on these facts and circumstances and conclude as a matter of law that Respondents grant of these funds to the PCCU constituted substantial financial support and assistance to that organization which was well calculated to influence employees to continue their adherence to that organization, and thus interfered with, restrained, and coerced employees in their statutory right of free choice of bargaining representative, in violation of Section 8(a)(2) and (1) of the Act. *The Carpenter Steel Company,* 76 NLRB 670, 682-684, 688-690; *The Standard Transformer Company,* 97 NLRB 669; *Thompson Ramo Wooldridge, Inc.* (*Dage Television Division*), 132 NLRB 993. Id at 281-282. *Id.* at 281-282.

In *NLRB v. Post Pub. Co.,* 311 F.2d 565, 569–570 (7th Cir. 1962), the court, in reversing the Board, stated:

> Absent any showing of employer domination, we fail to find in the record that showing of proscribed motivation warranting an inference drawn by the Board that it was calculated to unlawfully coerce or restrain the employees in their right to freely choose or change their bargaining representative.
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> The fact that the union members chose to eliminate dues and forego the provision for many fringe benefits to its members was a decision it made. Respondent did not participate in any way in the decision of the union as to how it would derive its income, or in what manner it would incur expenses in the conduct of its business. All that respondent did was to assist the employees in carrying out their independent activities. No one ever complained until a representation dispute was precipitated. That complaint was made by the dominant international organization in its effort to oust the small independent group.
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We have carefully reviewed the many cases cited by the Board. In practically all of them, the facts clearly demonstrate antiunion bias by the employer, financial support combined with union domination by the employer, discriminatory discharges, threats or other unfair labor practices interwoven with acts of alleged illegal financial support. Such is not the case here.

We hold, absent any showing of employer motivation in the original organization or the independent union or any showing of subsequent employer domination thereof, that a course of conduct over a period of years by an employer in its amicable relationship for 38 years with an independent union acting as a bargaining agent for employees (1) in permitting the union to hold meetings in its cafeteria (after working hours), (2) in permitting the union to print notices on the employer's duplicating machines, (3) and in permitting the union to retain annual profits of about $600 from the operation by the union of employer's cafeteria for employees and about $120 annually from the operation of a coffee vending machine for employees on its premises by the Union, all at the instance and request of the union and under the circumstances as herein earlier set out, is a permissible form of friendly cooperation designed to foster and resulting in uninterrupted harmonious labor-management relations, and is not the form of 'support' designed to interfere with, restrain or coerce employees in the free exercise of their right to choose or change their bargaining representative.

In *Utrad Corp.,* 185 NLRB 434, 441 (1970), enfd. 454 F.2d 520 (7th Cir. 1971), it was stated by the Trial Examiner as adopted by the Board that:

> Respondent also contends that it neither assisted nor dominated the Association. Section 8(a)(2) of the Act, in pertinent part, makes it an unfair labor practice for an employer "to dominate or interfere with the ... administration of any labor organization or contribute financial or other support to it." As pointed out, *supra,* the employees pay no dues or assessments to the Association which has no means of financial support other than what Respondent furnishes to it by its arrangement with the vending machine company. Respondent pays the officers of the Association not only for their time spent in conferring with management but also for time spent in conferring with each other and with Association department representatives, and for the time spent in conducting their elections. It also supplies the ballots and other paraphernalia to the Association for its elections, and furnishes the Association with space for its meetings in the plant. I, therefore, conclude that Respondent furnished unlawful assistance and support to the Association within the meaning of, and in violation of, Section 8(a)(2) of the Act. See *St. Joseph Lead Company, Zinc Smelting Division,* 171 NLRB No. 74.

In *Utrad Corp.,* supra, the respondent employer was ordered to withdraw and withhold recognition from the employee association to which it was found to have dominated, assisted, and contributed support.

In *St. Joseph Lead Co.,* 171 NLRB 541, 545–546 (1968), it was stated:

> It is also clear that Respondent has furnished unlawful assistance and support to the committees. As pointed out *supra*, the employees pay no dues or assessments to the committees and they have no means of financial support other than what Respondent furnishes them. Thus, Respondent pays the representatives not only for their time spent in conferring with management representatives (a payment which can be construed as expressly contemplated in the proviso to Section 8(a)(2) but also for their time spent in conferring with each other and with other employees, time spent in the conduct of their elections, and for the cost of the clerical and secretarial services they need. It also furnishes them with their only office space and furnishings and all supplies they need.
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> Whatever may be said with respect to the legality or illegality of employer support to a strong independent labor organization, which receives substantial financial support from its members and has a meeting place for employees off the employer's premises, there can be no doubt that the complete financial support given by Respondent to the employer domi-

> nated committees here involved is proscribed under Section 8(a)(2) of the statute. Such support and assistance tends to inflate the degree of the domination existing by virtue of other factors pointed out above and further weakens the ability of the labor organization to act freely as a true bargaining representative of the employees it purports to represent.[5]

In *St. Joseph Lead Co.,* the respondent employer was ordered to disestablish the involved employees' advisory committee.

In *Jackson Engineering Co.,* 265 NLRB 1688, 1688–1689 (1982), enfd. 735 F2d 1384 (DC Cir. 1984), cert. denied 469 US 1072 (1984), the Board approved the judge's finding that the respondent employer violated Section 8(a)(2) of the Act and the respondent union violated Section 8(b)(1)(A) by certain union officials receiving concealed kickback payments from the respondent employer. The Board noted that at about the same time the respondents were negotiating midterm contract modifications granting the employer economic concessions concealed payments of large sums of money were exchanging hands. The Board stated, "We find that these concurrent actions operated to taint and undermine the bargaining relationship between Respondents and the contract which was negotiated by them while the payments were being made. Our conclusion in this regard is not affected by the fact that Anastasio, Scotto, and Seregos personally did not engage in the negotiations which led to the modified contract. Although those individuals may not personally have participated, they were, at all material times, Respondent Union's executive vice president and president and Respondent Employer's president, respectively. Under these circumstances, we do not regard their divorce from the actual negotiations to be determinative of this issue." The Board stated, "we shall order that: (1) Respondent Employer withdraw and withhold all recognition from Respondent Union as the collective-bargaining representative of Respondent Employer's employees, unless and until said labor organization has been duly certified by the National Labor Relations Board as the exclusive representative of such employees; (2) Respondent Employer and Respondent Union cease giving effect to the September 1979 collective-bargaining agreement, or to any modification, extension, supplement, or renewal thereof, unless and until Respondent Union shall have been certified by the Board; …".

Similarly, in *Mistletoe Exp. Serv.,* 295 NLRB 273, 293 (1989), an employer and union were found to have violated Section 8(a)(1) and (2) and Section 8(b)(1)(A) of the Act, respectively, by placing in their contract a clause providing that the employer pay the union 50 cents for each hour worked by a casual employee. See also, *Sweater Bee By Banff, LTD.,* 197 NLRB 805 (1972), enfd. 486 F.2d 1395 (2nd Cir. 1973), where the respondent employer was found to have violated Section 8(a)(2) of the Act by paying dues to a union from employer funds without deducting dues from employees' paychecks, and the union violated Section 8(b)(1)(A) of the Act by executing and giving effect to a collective-bargaining agreement where this practice continued.

In the instant case, Wells operates a multi-building facility housing about 1,565 bargaining unit employees where it produces ice cream related products. Kruckenberg, the charging party, signed off on a Department of Labor Form LM-1 on October 19, 2005 as the president of the Employee's Committee of Le Mars and Omaha, whose name was changed over the years to take on the current name of the Union. It stated in the 2005 Form LM-1 that there were expected receipts of over $10,000 for that year. The form contained the statement explaining that, "Our funds for the Committee is derived from 8% return from the vending machines in our plants." Kruckenberg signed the Union's Form LM-3 reports as the Union's president for the years 2006, 2007, and 2008. For 2006, vending and recycling earnings for the Union were: $23,757. Similar earnings were reported as follows: for 2007 $21,747; for 2008, $23,109; for 2009, $20,757; for 2010, about $8000; for 2011, $15,430; for 2012, $15,594; for 2013, $18,111; and for 2014, $17,395. A position statement filed by Wells with the Region dated May 27 shows that for the first four months of 2015, the Union on average was earning over $2,400 a month in vending and micro-market commissions, which would equal $28,800 on an annual basis. In fact, a Union expense sheet shows in 2015 through October 21, 2015 the Union received $25,644 in vending revenue from Chesterman the company that contracted with Wells to provide vending and micro-market services.

DeVos, the Union's secretary-treasurer, testified the Union is funded by receiving an 8% commission from the sale of vending of snacks and products, not soda, from vending machines supplied by Chesterman which contracts with Wells to provide vending machines and micro-markets at Wells' facilities. The vending machines and micro-markets from which the commissions are forwarded to the Union are used by bargaining unit employees as well as non-bargaining unit personnel such as secretaries, managers, and supervisors. The Union's expense sheet for 2014 shows a cash balance at the end of 2013 was $34,957.55. It shows, during the year 2014, the Union had a total in deposits of $17,395.44, all of which were listed under the name Chesterman Company "Vending Machine," except for a $275.00 IRS refund and a listing for a $200 void check. DeVos testified the funds were received from the eight percent revenue the Union receives from the vending machine sales; as well 5 percent can redemption amount. DeVos testified that after he became treasurer the Union stopped receiving funds for recycled cans. The record contains the Union's partial expense sheet for 2015. The great bulk of the deposits were listed as derived from Chesterman under the heading "vending machine." The Union's expenses in 2015 included over $6000 in attorney's fees, which DeVos testified were for defending the NLRB charge, as well as a Department of Labor Investigation. There was an additional $3828.50 going to the same law firm marked as just "services."

DeVos testified the Union has no contractual relationship with Chesterman or any of its subsidiaries. He testified he thought Wells has such a relationship with Chesterman. DeVos testified the Union does not negotiate any terms with Chesterman, like price, equipment, or services to be provided. DeVos testified the Union does not provide any services to Chesterman. The record contains a contract between Wells and Chesterman dated April 8, 2014. The contract was signed for Wells by McCannon, facilities manager. DeVos testified he has never seen the agreement between Chesterman and Wells. DeVos

testified since he has become a union officer he has not attended a union meeting where they discussed vending.

DeLaughter, Wells director of HR for operations, testified Wells furnishes Chesterman and its vending subsidiaries access to the Wells property, including space for their equipment and vending, furnishes them electricity, lighting and heat. DeLaughter testified he believes the Union's only source of revenue is the funding from Chesterman. He testified that Wells, to his knowledge, has not received any authorization from employees that they want the eight percent commission to go to the Union. While DeLaughter testified did not know how much on a monthly basis during 2015 Chesterman forwarded to the Union from revenue which they collected from vending machines and micro-markets, he testified he did see reports from Chesterman regarding how much they forwarded to the Union during that period of time as part of the information he gathered to respond to the unfair labor practice charge.

Vondrak works for Chesterman as a sales representative. Vondrak testified that as a sales representative for Chesterman he has interactions with Wells. Vondrak testified that primarily his interaction is with McCannon. Vondrak testified that reports are run on a monthly basis concerning vending and micro-market sales at Wells to tabulate the eight percent commission on sales. He testified that in 2014 those checks were generated and distributed directly to Wells. Vondrak identified a vending commission check dated February 12, 2014, with the payer listed as Chesterman in the amount of $1375.12 made out to Wells SICP. When asked why the check was made out to Wells SICP, Vondrak testified that he had been overseeing the commission procedure since 2009, off and on. He testified that since he was doing this in 2009, that was how the checks were always addressed, and they were all sent to a central location. He testified he thought the checks being sent to a central location was something agreed upon between Wells and Chesterman.

On April 21, Kruckenberg filed the unfair labor practice charge in this case against Wells. On May 21, McCannon sent an email addressed to Vondrak and his supervisor. In the email McCannon asked Vondrak to send her as quickly as possible, "An accounting of vending sales and payments by location since January 1, 2014 (on a monthly basis), including:" the amounts kept by Wells; the amounts the vendor sent to Wells for non-corporate-headquarter vending machines; and the amounts Wells forwarded to the Employee Committee. Vondrak responded on May 21 stating "Attached is the commission information for 2014 and for 2015 Year to Date." He stated, "We do not have any information as to where the money was distributed after the commission checks were sent out… such as the amounts kept by Wells or the amounts Wells forwarded to the Employee Committee. The only information we have is the amounts of the commissions that were sent out along with where the check was issued to."

On June 25, McCannon sent Vondrak an email, stating, "Effective immediately, please make the following changes with respect to any and all commission checks payable by Chesterman in connection with the vending machines placed by Chesterman at non-corporate facilities owned by Wells Enterprises, Inc." Vondrak was told to make such checks payable to "United Dairy Workers of Le Mars;" to eliminate any references to Wells, Wells Enterprises, Inc., and Wells Dairy, Inc. on the checks. Vondrak was instructed to mail such checks directly to United Dairy Workers of Le Mars to the attention of DeVos at the listed post office box contained in McCannon's email. Vondrak responded to McCannon by email dated June 26 wherein he listed some questions. One of which was, "Do you want us to continue to provide you with a month by month report on the commissions sent out which will show the amounts for each location?" Vondrak also asked for "As far as negotiating any future commission changes, pricing changes, vending/market program changes, will we continue to work with you on these matters or will we need to be in contact with the" Union's representative? McCannon replied by email dated July 1, wherein she stated that Wells does not want any commission reports for the amounts paid to the Union. She stated, "We expect to contact you within the next couple of months with a process for negotiating these issues." Vondrak testified there was a change in the commission distribution process in June 2015. Vondrak testified Chesterman received instructions from Wells that the commission checks needed to be forwarded to the United Dairy Workers of Le Mars moving forward, instead of being addressed to all the different Wells locations to which they were being sent. Vondrak testified that beginning in June 2015 the vending commissions were combined into two separate checks both issued to the Union. One was for the vending machines only. The other was a combination of all the micro-market locations which Chesterman serviced, excluding the corporate office. Vondrak testified McCannon is the person that signed Chesterman's contract with Wells. He testified that if she had said "Please make all checks payable to Wells Enterprises, Inc.," he would have conformed to her request. Vondrak testified he followed McCannon's instructions concerning the checks.

Similarly, DeVos testimony reveals that prior to June 2015, the Chesterman vending checks were made out to and sent directly to Wells, rather than the Union. The checks were then handed to DeVos by Wells personnel, and or forwarded to him via inter office mail. Upon receipt of the checks, made out to Wells, DeVos took them and deposited them into the Union's credit Union account. DeVos testified that in June 2015, the process changed in that the checks were then made out to the Union, and mailed by Chesterman to the Union's newly acquired post office box to DeVos attention.

The unfair labor practice complaint issued against Wells and the Union on December 8. Section 10126.2 of the NLRB Casehandling Manual pertaining to unfair labor practices provides that, "Following a Regional Office determination as to the merits of a case, the Board agent should pursue settlement before issuance of complaint." On November 24, DeLaughter sent DeVos an email with the Subject: "EC letter regarding PO Box, funding, etc." In the email DeLaughter stated to DeVos, "As discussed yesterday, could you provide me with a letter from the EC Officers, either you as Secretary or Kevin as President that covers the following information:

- The fact that you receive checks directly from Chesterman's not Wells.

- The fact that checks are sent directly to the EC PO Box and deposited by the EC.
- The fact that the EC no longer receives the proceeds of can/bottle deposits.
- The fact that you don't share the amounts of the checks from Chesterman's with Wells.

DeVos responded by email that afternoon stating he was working on it and asking, "Do you also want me to include that the vending commission we receive is only for machines in represented work places?" To which DeLaughter replied that would be helpful. Shortly thereafter on November 24, DeVos wrote to DeLaughter, "Here is what I have. If you would like changes, revisions or word smithing just tell me what you need." DeLaughter wrote back on November 24, "I made just a couple of small corrections. I removed the phrase 'very few represented employees' and just left it as you don't receive commission from areas where there aren't represented employees." On the morning of November 30, DeLaughter emailed DeVos that DeLaughter had to make another correction. He stated, "Can you re-sign this attached version and email it back to me?" DeVos signed the memo, dated November 30, 2015, to DeLaughter. The memo states it provides an outline of how the vending commission from Chesterman to the Union works. The memo states the Union receives a commission on all sales from vending in areas that represented workers of the Union use, and that the Union does not receive any commissions from areas that do not have represented workers. It states that "Monthly, Chesterman sends commission checks" to the Union, which are made out to the Union as payee on the check, and are mailed to the Union's P.O. box. It states, "At no time, does Wells Enterprises see or have any knowledge of the size or amount of the checks." DeVos testified he wrote the memo at DeLaughter's request, and there was no prior written procedure he was aware of describing the process prior to DeVos' November 30 memo. DeVos testified he thought the request for the memo came from DeLaughter's attorney.

Similarly, on November 23, McCannon sent Vondrak an email stating that by November 25, she needed a letter on Chesterman letter head explaining a detailed description of the flow of funds from employee purchases at vending machines to payment of funds to the Union, ownership of the vending machines, that Chesterman does not provide any reporting to Wells with respect to monies collected from the vending machines or paid to the Union, that Chesterman remits funds to the Union at the post office box owned by the Union. On November 23, Vondrak sent a draft letter, dated November 23, to McCannon in response to her request. On December 2, McCannon sent a revision of Vondrak's draft to him. McCannon's revision of Vondrak's draft contained the date November 30. On December 3, Vondrak sent McCannon an email, stating "I have signed the letter which you had sent back to us, scanned it, and attached it to this email. Let me know if you need anything else from me." Vondrak signed the revised version provided to him by McCannon as it was sent including the November 30 date. The Vondrak memo, dated November 30, states "this letter pertains to the flow of the money which Wells employees use for the product purchases from Premium Food and Beverage (which is owned by Chesterman Co.) vending and micro-market equipment, to the" Union. Included in the description is that Wells' employees make purchases through one of the vending or micro-market locations which Premium (Chesterman) has placed throughout the Wells' facilities. The memo states Chesterman does not report to Wells regarding the funds collected; and no reports are shared with Wells which show the amount of funds which Chesterman forwards to the Union. The memo states all monthly commission statements and checks in regard to the vending and micro-market sales are issued exclusively to the Union listing the name United Dairy Workers of LeMars, to the attention of DeVos, with a listed post office box.

I find that Wells has violated Section 8(a)(2) and (1) of Act by contributing vending and micro-market funds to the Union, and the Union has violated Section 8(b)(1)(A) of the Act by receiving those funds. It is admitted by the parties that the Union is a labor organization with the meaning of section 2(5) of the Act, and Section 8(a)(2) provides that "it shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.." Here there is no question that Wells is contributing significant financial support to the Union in violation of Section 8(a)(2) of the Act. In this regard, the Union collects no dues or initiation feels and therefore these contributions by Wells are its sole source of income. See, *Electromation, Inc.,* 309 NLRB 990, 996 (1992), enfd. 35 F.3d 1138 (7th Cir. 1994); *Post Publishing Company,* 136 NLRB 272, 273 (1962), enf. denied 311 F.2d 565 (7th Cir. 1962); *Utrad Corp.,* 185 NLRB 434, 441 (1970), enfd. 454 F.2d 520 (7th Cir. 1971); *St. Joseph Lead Co.,* 171 NLRB 541, 545–546 (1968); *Jackson Engineering Co.,* 265 NLRB 1688, 1688–1689 (1982), enfd. 735 F2d 1384 (DC Cir. 1984), cert. denied 469 US 1072 (1984); *Mistletoe Exp. Serv.,* 295 NLRB 273, 293 (1989); and *Sweater Bee By Banff, LTD.,* 197 NLRB 805 (1972), enfd. 486 F.2d 1395 (2nd Cir. 1973).

Here, the Union was receiving large sums of money from Wells from vending sales on an annual basis since at least 2006. For example, it received for 2013, $18,111; and for 2014, $17,395. A position statement filed by Wells with the Region dated May 27 shows that for the first four months of 2015, the Union on average was earning over $2,400 a month in vending and micro-market commissions, which would equal $28,800 on an annual basis. In fact, the Union's expense sheet for 2015 through October 21, 2015 the Union received $25,644 in revenue from Chesterman for the vending and micro-market receipts. The testimony of the witnesses reveals these receipts are the Union's sole source of funding. As the General Counsel points out, citing *Pathmark Stores, Inc.,* 342 NLRB 378, fn. 1, I am constrained to follow Board law regarding *Post Publishing Company,* 136 NLRB 272, 273 (1962), enf. denied 311 F.2d 565 (7th Cir. 1962). It should be noted that I also agree with the Board precedent there. Moreover, the facts here are markedly different from what the court relied on in refusing to enforce the Board order in *NLRB v. Post Pub. Co.,* supra. There, the court noted that the annual amount of contributions to the union through vending sales came to $720. The General Counsel cites a Bureau of Labor Statistics inflation conversion site,

which shows that $720 at the applicable time adjusted for inflation in 2015 dollars would only equal $5,650.74 annually. Yet, here the Union received $25,644 for just the first 10 months of 2015, which was more than fourfold the amount PCCU had received annually. Here, the Union did not choose to eliminate dues as they have no history of dues ever being collected. Moreover, while I do not view this as determinative, the court noted in *Post Publishing* that no one had ever complained until a representation dispute precipitated the charge by an international labor organization seeking to oust the PCCU there. Here, the charge was not initiated as result of an election dispute. Rather, it was filed by a bargaining unit member and employee of Wells who voiced his complaint by the filing of his unfair labor practice charge. Here, the Union's expenses in 2015, listed $9,828.50 in legal fees, which DeVos testified were for defending the NLRB charge, as well as a Department of Labor Investigation. Thus, Wells was funding the Union's litigation expenses, not just promising attorney's fees as had been done in *Post Publishing*.

Moreover, the vending and micro-market funds are not the only funds and/or support Wells provides the Union. DeVos testified there is no procedure for becoming a union member. Rather, as per the CBA, once someone becomes a full time employee in the defined unit they are considered a represented employee of the Union. DeVos testified the Union has no membership card, no initiation fees, dues, or assessments. He testified that during his 30 years working for Wells there has never been any dues, initiation fees or assessments. DeVos testified that all 1,565 employees in the bargaining unit are automatically members of the Union. As per the CBA between the Union and Wells, the five Union officers receive 1 hour paid time from the Wells to meet after the monthly joint Union-Employer meeting to discuss amongst themselves what was discussed between the management and the officers at the prior meeting. The CBA also provides the Employer will provide 5 paid hours a week to be used at the discretion of the Union president to conduct union business. The CBA provides that the purpose of this paid time is for the Union officers to meet with employees and start building relationships and trust between the employees and the Union. This time is not to be used to resolve or work on grievance issues, nor prepare for negotiations. The CBA also provides that "The Company will provide the EC with the opportunity to meet with full-time regular new hires or rehires for purposes of explaining the roles and responsibilities of the Employee Committee." It is stated that the Employer "will provide paid time, not to exceed 30 minutes, for EC members to conduct an orientation meeting." DeVos testified these meetings are actually 45 minutes long for new full time employee orientation. DeVos testimony was murky as to who was paid for attending these meetings, however, the CBA provides for paid time, and I did not find DeVos testimony credibly contradicted it. Thus, the CBA provides at least two aspects of paid time for the Union to proselytize its agenda amongst existing and new employees. Finally, DeVos testified the Union last negotiated a CBA with Wells in 2013, and the process took about 4 months. He testified the Union officers over the 4 month period were meeting with the Employer 5 days a week concerning the negotiations. DeVos testified the meetings were held offsite, but during basic work hours. DeVos testified the Union officers were paid for the time spent during the meetings. The union officers being paid for these meetings was not provided for in the CBA, therefore not necessarily known by the bargaining unit. While permitted by Section 8(a)(2) of the Act, the length of time of these payments for negotiating with management took place as reported by DeVos could certainly lead to questions of the bonafides of the Union officers in acting on behalf of the bargaining unit. *St. Joseph Lead Co.,* 171 NLRB 541, 545–546 (1968).

Moreover, the conclusion that the Union was not operating in an arm's length fashion in its dealings with Wells is confirmed by the fact that about two months after the unfair labor practice charge had been filed against Wells, and within 3 weeks after a similar charge had been filed against the Union, McCannon sent Vondrak an email, stating, "Effective immediately, please make the following changes with respect to any and all commission checks payable by Chesterman in connection with the vending machines placed by Chesterman at non-corporate facilities owned by Wells Enterprises, Inc." Vondrak was told to make such checks payable to "United Dairy Workers of Le Mars;" to eliminate any references to Wells, Wells Enterprises, Inc., and Wells Dairy, Inc. on the checks. Vondrak was instructed to mail such checks directly to United Dairy Workers of Le Mars to the attention of DeVos at the listed post office box contained in McCannon's email. Vondrak responded to McCannon by email dated June 26 wherein he listed some questions. One of which was, "Do you want us to continue to provide you with a month by month report on the commissions sent out which will show the amounts for each location?" McCannon replied by email dated July 1, wherein she stated that Wells does not want any commission reports for the amounts paid to the Union. Vondrak testified there was a change in the commission distribution process in June 2015. Vondrak testified Chesterman received instructions from Wells that the commission checks needed to be forwarded to the United Dairy Workers of Le Mars moving forward, instead of being addressed to all the different Wells locations to which they were being sent. Vondrak testified McCannon is the person that signed Chesterman's contract with Wells. He testified that if she had said "Please make all checks payable to Wells Enterprises, Inc.," he would have conformed to her request. Vondrak testified he followed McCannon's instructions as to who to send the checks to. Similarly, DeVos testimony reveals that prior to June 2015, the Chesterman vending checks were made out to and sent directly to Wells, rather than the Union. DeVos testified the process changed in June 2015, in that the checks were then made out to the Union, and mailed by Chesterman to the Union's newly acquired post office box to DeVos' attention. I have concluded, noting that McCannon did not testify, that Wells orchestrated the change in the process in response to the unfair labor practice charges, as the testimony reveals that prior to the change the checks, since at least 2009, has been sent to Wells as the payee, the Union received them from Wells and then deposited them in the Union's account.

Along these lines, towards the end of November shortly before the unfair labor practice complaint issued, Wells instructed both Chesterman and the Union to set forth in writing the new

procedures they were following in terms of mailing the checks to the Union, rather than Wells. In fact, Wells set forth in writing to each the details it wanted in each of their statements, including the assertion that Wells did not have access to the amounts the Union was being paid. Of course, both Chesterman and the Union cooperated with Wells' instructions, and in fact allowed Wells to make changes in their original submissions which they incorporated in each of their final signed statements. Since Wells was in total control of the contract and relationship with Chesterman as Vondrak acknowledged, he would have followed any instructions McCannon provided with respect to the issuance of the checks. Moreover, while both the Union and Chesterman stated in their submission that Wells currently did not have access to the amounts paid to the Union; prior to June 2015 change in procedure Wells did have such access for many years as the checks were made out to Wells. Even after the policy change, all Wells had to do was request from Chesterman the amounts being paid to the Union and Chesterman provided the information to Wells. Wells made this request to respond to the unfair labor practice charge, and I have concluded that Wells as the contracting party with Chesterman could have made such a request any time it desired. Thus, the process by which the Union received the checks from Chesterman changed in form not in substance. This was done at Wells behest, and indicates the control that Wells exercised not only over Chesterman but over the Union as Wells orchestrated the actions of each.

In sum, there is no procedure for becoming a union member. The Union has no membership card, no initiation fees, dues, or assessments. DeVos testified that during his 30 years working for Wells there has never been any dues, initiation fees or assessments. DeVos testified that all 1,565 employees in the bargaining unit are automatically members of the Union. He testified they are fully represented as soon as they reach full time status. DeVos testified he knows there are certification papers for the Union dated December 19, 2005. However, DeVos did not know how the Union was certified, and he did not recall there being a vote for the Union. As per the CBA in effect at the time of the trial, the Union officers receive 1 hour paid time from Wells to meet with each other after the monthly joint Union-Employer meeting. The CBA also provides the Employer will provide 5 paid hours a week to be used at the discretion of the Union president to conduct union business. The CBA provides this time is for the Union officers to meet with employees and start building relationships and trust between the employees and the Union. It states, "this time is not to be used to resolve or work on grievance issues, nor prepare for negotiations." The CBA also provides that "The Company will provide the EC with the opportunity to meet with full-time regular new hires or rehires for purposes of explaining the roles and responsibilities of the Employee Committee." It is stated that the Employer "will provide paid time, not to exceed 30 minutes, for EC members to conduct an orientation meeting." DeVos described these orientation meetings being 45 minutes in length. DeVos testified the Union last negotiated a CBA with Wells in 2013, and the process took about 4 months. DeVos testified they were meeting with the Employer 5 days a week over the 4 month period. DeVos testified the Union officers were paid for the time spent during the meetings.[4]

In addition, to these payments the Union receives vending commission payments from Wells to perform its basic functions. In this regard, the Union since at least 2005 has been receiving an eight percent vending machine commission from a third party for vending machines maintained on Wells' property for which the contract is with Wells for which the Union does nothing in consideration for this money. In 2014, the vending machine sales where expanded to include the sales of fresh foods sold at micro-markets again at certain Wells facilities for which Wells maintained the contract for the sales. In 2014, the Union received $16,920 in vending income. For the first 10 months of 2015, the Union received $25,649.56 vending income. In fact, I have concluded that following the filing of the current unfair labor practice charges, Wells orchestrated with the Union and Chesterman a change in the way the Union received its vending checks from Chesterman in that the checks were no longer made out to Wells but were now made out to and mailed directly to the Union by Chesterman. I have also concluded that shortly before the complaint issued, Wells instructed both the Union and Chesterman to codify this new procedure in writing, instructing them what to write, editing what they wrote, and having them sign their respective documents when Wells was satisfied with the final written product.

Wells argues in its brief as reasons to dismiss the complaint that it is not involved in the Union's CBA ratification process and that the last agreement was initially voted down by the employees. It argues that DeLaughter played no role in drafting the Union's bylaws, nor did he appoint union stewards. Wells argues it does not determine who serves as union officers, and who serves on the Union's negotiation committee. Wells argues it does not determine who serves as legal advisors for the Union, or control who the Union uses for accountants. Wells argues it does not provide the Union with computers, or technical support such as tablets, phones, scanners, fax machines, etc. Wells argues it does not provide the Union with administrative support such as secretarial or word processing. It does not provide the Union with office or meeting space at Wells facilities. These points should be put in context, since Wells through vending and micro-market funds provided the Union with at least $25,649.56 for the first 10 months of 2015, alone. If the Union needed to rent rooms, provide for technical support, etc., it certainly had the funds accorded by Wells to do

[4] While the complaint only specifically alleges the payments and receipt of vending fees as violative of the Act, Wells introduced into evidence the parties' current and prior CBA. Wells and the Union also introduced evidence pertaining to grievance processing and collective-bargaining. Thus, they sought to litigate the full relationship between Wells and the Union, and I find it appropriate to consider that relationship as background information to the allegations listed in the consolidated complaint. In this regard, at the behest of Respondents these matters have been fully litigated. I also find of no moment to this case that Charging Party Kruckenberg participated as the Union's president from 2005 to 2008, during which time the Union was receiving vending funds as its sole support. Kruckenberg, an employee of Wells, is a layperson and the fact that early on he may have viewed those payments as proper, does not go to the ultimate conclusion in this case as to whether they are violative of the Act.

so. In this regard, in July 2015, the Union spent $513.58 on a "scanner & equip" as reported in its expense sheet for that year, as well as substantial sums in legal fees in 2015, and paid for bookkeeping services all gleaned from its vending income courtesy of Wells. Additionally, Wells paid the Union officers for time spent negotiating the current CBA, which also provides for additional paid described time for the Union to conduct promotional and other activities. So, for the reasons stated, I have rejected Wells' arguments and have found as stated that it has violated Section 8(a)(2) and (1) of the Act by contributing financial or other support to the Union, and the Union has violated Section 8(b)(1)(A) of the Act by receiving those funds.

CONCLUSIONS OF LAW

1. Wells Enterprises, Inc. (Wells) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Dairy Workers of LeMars (the Union or the Employees Committee) is a labor organization within the meaning of Section 2(5) of the Act.

3. By providing vending machine proceeds to the Union either directly from Wells or through a third party for vending machines and micro-markets operated on Wells' premises Wells has contributed financial or other support to the Union in violation of Section 8(a)(2) and (1) of the Act.

4. By accepting and receiving financial support from Wells in the form of vending machine proceeds either directly from Wells or from a third party for vending machines and micro-markets operated on Wells premises the Union has accepted and received financial support from Wells in violation of Section 8(b)(1)(A) of the Act.

5. Wells and the Union's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found Respondents have engaged in certain unfair labor practices, Respondents must cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act. The General Counsel in its brief only seeks the cessation of payments by Wells and the receipt by the Union of vending machine proceeds as a remedy. While the General Counsel argues that I am bound by the Board's decision in *Post Publishing Company,* 136 NLRB 272, 273 (1962), enf. denied 311 F.2d 565 (7th Cir. 1962), no explanation is given as to why the remedy the Board required in that decision is not appropriate here. The Charging Party seeks in its brief and in its addendum thereto an Order that the Union no longer be the collective bargaining representative, and that the existing collective-bargaining agreement be eliminated pending an election by the Board. Wells argues in its brief that such an order would be punitive. Aside from Wells position in its brief that no violation exists, it contends that if a violation is found any remedy should be limited to that sought by the General Counsel.

In *Arden Furniture Industries,* 164 NLRB 1163, 1164–1165, (1967), in finding a violation of Section 8(a)(2) and (1) of the Act as stated by the Trial Examiner, the Board majority, nevertheless refused to follow the Trial Examiner's recommendation that the respondent employer be ordered to cease giving effect to its current contract with District 50. The Board majority stated the Board has refused to grant a cease-recognition remedy where the "unfair labor practice to be remedied occurred during the term of an agreement, lawful on its face, the execution and maintenance of which are not under attack." However, the Board majority stated, "in the special circumstances of this case, we believe that more than the routine cease-assistance remedy is required." The Board noted that, although near the termination of the current contract the employees would have the right to timely file a petition, upon a showing of interest, for a representation election the respondent employer's threats were having a continuing effect upon employees in discouraging their activity on behalf of a rival union. The Board majority stated, "To expunge the effect of these unfair labor practices, we shall order that Respondent refrain from recognizing or bargaining with District 50 or its Local Union No. 15386 as representative of its employees when the current contract expires on June 18, 1967, unless and until it is certified by the Board as such representative." The Board majority stated:

> Nor do we view the other cases cited in the dissenting opinion as requiring a contrary result. In *The Post Publishing Company*, 136 NLRB 272, 273, the Order set aside an existing contract which was presumptively valid in its execution but did so on special considerations that the assisted union was shown on that record to be unable to maintain its exclusive representative status and carry out its functions without the respondent's unlawful support and assistance which had continued into the 10(b) period. Id at 1165, fn. 4.

As set forth in detail above in *Post Publishing Company,* 136 NLRB 272, 273 (1962), enf. denied 311 F.2d 565 (7th Cir. 1962), the Board majority stated in the remedy section of its decision that:

> We agree with the Trial Examiner that an order requiring Respondent to withdraw and withhold recognition from the PCCU until and unless it is certified as the exclusive representative of the employees in the Respondent's mechanical departments is necessary to remedy the unfair labor practices found herein. The facts of the case demonstrate that, for almost the entire period of the PCCU's existence, the Respondent has been furnishing virtually all of the financial support necessary to carry out its functions. The record further demonstrates that at a meeting called by the Employer to discuss employee grievances which the Respondent viewed as the reason behind the organizational drive being made by the ITU, the Respondent unlawfully offered to pay the expenses of an attorney to represent the employees in bargaining negotiations. That offer was made in response to employee expressions of doubt as to the benefits of negotiating with the Respondent under the old system. At the same meeting the Respondent expressed its opposition to the ITU and its preference for dealing with PCCU. Sometime after this meeting, employees, who had signed authorization cards on behalf of the ITU, submitted a formal petition of withdrawal to the ITU.
>
> In our opinion, the above-circumstances warrant a conclusion that PCCU cannot maintain its exclusive representative status

without the Respondent's unlawful support and assistance.

I find the facts in *Post Publishing Company,* supra, more akin to the situation presented here in that Wells has provided total financial support for the Union throughout its existence in the form of vending, and later vending and micro-market commissions. In many ways the facts are more compelling here for the type of remedy visited by the Board in *Post Publishing*, in that the financial contributions here in 2015 provided by Wells to the Union were around five times the amount provided by the employer in *Post Publishing* for the same period of time. Noting that the employees automatically become Union members here, that they have never signed anything showing their support for the Union, that the CBA accords the Union paid time to meet with new hires, as well as provides paid time allotted to meet with incumbent employees, I find that this process of indoctrination and support visited upon the bargaining unit by the Wells and the Union has the intended purpose of limiting employee free choice. The removal of the long term total support provided to the Union by Wells here raises a similar question raised in *Post Publishing* as to whether the Union here, which has used that support for gift cards and attorney's fees do defend allegations of impropriety "can maintain its exclusive representative status without the Respondent's unlawful support and assistance."

However, I have concluded that a more limited remedy than the Board required in *Post Publishing* will be effective here and less disruptive in serving the Act's ends of employee free choice. First, I note that the current CBA between Wells and the Union is set to expire on December 31, 2016, a time that is fast approaching. While I have concluded that Respondents unfair labor practice both current and long term have created a systemic atmosphere denying the employees free choice of their collective-bargaining representative as required by the Act, in view of short remaining term of the CBA, I do not feel it necessary to recommend that it be totally expunged. Accordingly, I recommend that Wells refrain from recognizing or bargaining the Union as representative of its employees when the current contract expires on December 31, 2016, unless and until it is certified by the Board as such representative. I also recommend in my Order that Wells cease providing the Union the paid financial assistance required in the CBA for the Union to meet with new hires and current employees. I do not view this remedy as punitive as Wells contends. There is no indication that the employees ever selected the Union as their collective bargaining representative other than it being foisted upon them by unfair labor practices that continued within the Section 10(b) period. Giving the employees the opportunity to vote, and perhaps legitimize the Union if it is selected for future representation, without unlawful assistance, certainly is not punitive to the Union, nor to Wells which under the Act has no say in the employees' right to select a union, or to refrain from union activity.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[5]

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The National Labor Relations Board orders that:

A. Respondent, Wells Enterprises, Inc. (Wells) its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Offering or contributing financial or material assistance and support, including providing vending machine proceeds either directly from Wells or through a third party for vending machines and micro-markets operated on Wells' premises, to the United Dairy Workers of LeMars or any other labor organization of its employees, or otherwise interfering with the representation of its employees through a labor organization of their own choice.

(b) Recognizing or bargaining with the United Dairy Workers of LeMars, as the representative of its employees when their current agreement expires on December 31, 2016, unless and until such Union is certified after a Board election.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

(a) Immediately take all actions necessary to end any arrangements that permit the United Dairy Workers of LeMars to receive vending machine and micro-market proceeds from these operations taking place on Wells' premises as well as any other financial assistance provided by Wells to the Union.

(b) At the expiration of the current contract between Wells and the United Dairy Workers of LeMars on December 31, 2016, withdraw and withhold all recognition from the Union as the representative of its employees for the purpose of dealing with Wells concerning grievances, wages, rates of pay, hours of employment, or other terms or conditions of employment, unless and until such Union is certified after a Board election.

(c) Within 14 days after service by the Region, post at its facilities in Le Mars, Iowa where bargaining unit employees represented by the Union work, perform services, or have access to copies of the attached notice marked "Appendix A."[6] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by Wells' authorized representative, shall be posted by Wells and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Wells to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Wells has gone out of business, or is no longer providing services at the facilities involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Wells at those facilities at any

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

time since October 21, 2014. Similarly, Wells shall duplicate and mail, at its own expense copies of the attached notice to all employees who are on layoff, and former bargaining unit employees who have left Wells' employ who worked at the involved facilities on or after October 21, 2014. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Wells customarily communicates with its employees by such means to all bargaining unit employees represented by or formerly represented by United Dairy Workers of LeMars.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Wells has taken to comply.

B. Respondent the United Dairy Workers of LeMars (the Union), its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Accepting or receiving financial or material assistance and support for Wells, including vending machine or micro-market proceeds either directly from Wells or through a third party, for vending machines and micro-markets operated on Wells premises.

(b) Bargaining with Wells, as the representative of its employees, after the current agreement with Wells expires on December 31, 2016, unless and until such time the Union is certified after a Board election as the representative of Wells' employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 8(b)(1)(A) of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

(a) Immediately take all actions necessary to end any arrangements with Wells, or any third parties, that permit the Union to receive vending machine and/or micro-market proceeds from these operations taking place on Wells' premises as well as any other actions needed to end any other financial assistance provided by Wells to the Union.

(b) At the expiration of the current contract between Wells and the United Dairy Workers of LeMars on December 31, 2016, immediately cease serving as the collective-bargaining representative of Wells' employees for the purpose of dealing with Wells concerning grievances, wages, rates of pay, hours of employment, or other terms or conditions of employment, unless and until such Union is certified after a Board election.

(c) Within 14 days after service by the Region, post at its offices, meeting halls, and locations at Wells facilities where the Union customarily posts notices copies of the attached notice marked "Appendix B."[7] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Union's authorized representative, shall be posted by the Union and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Union customarily communicates with Wells bargaining unit employees and/or its members who are Wells employees by such means to all Wells bargaining unit employees represented by the Union, or who were represented by the Union on or after December 8, 2014.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Union has taken to comply.

Dated, Washington, D.C. June 20, 2016.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT offer or contribute financial support or material assistance and support, including providing vending machine and micro-market proceeds either directly from us, or through a third party, for vending machines and micro-markets operated on our premises to the United Dairy Workers of LeMars or any other labor organization, or otherwise interfere with the representation of our employees through a labor organization of their own choice.

WE WILL NOT recognize or bargain with the United Dairy Workers of LeMars, as the representative of our employees after their current agreement with us expires on December 31, 2016, unless and until such Union is certified after a Board election.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL immediately take all actions necessary to end any arrangements that permit the United Dairy Workers of LeMars to receive vending machine and micro-market proceeds from operations taking place on our premises as well as end any

other financial assistance provided by us to the Union.

WE WILL upon the expiration of the current contract between us and the United Dairy Workers of LeMars on December 31, 2016, withdraw and withhold all recognition from that Union as the representative of our employees for the purpose of dealing with us concerning grievances, wages, rates of pay, hours of employment, or other terms or conditions of employment, unless and until such time as the Union is certified after a Board election.

WELLS ENTERPRISES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-150544 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT accept or receive financial or material assistance and support from Wells Enterprises, Inc., including vending machine or micro-market proceeds either directly from Wells or through a third party, for vending machines and micro-markets operated on Wells' premises, or receive any other material assistance or financial support from Wells Enterprises, Inc.

WE WILL NOT bargain with Wells Enterprises Inc., as the representative of its employees, after our current agreement with Wells Enterprises Inc., expires on December 31, 2016, unless and until such time as we are certified after a Board election as the representative of employees of Wells Enterprises Inc.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 8(b)(1)(A) of the Act.

WE WILL Immediately take all actions necessary to end any arrangements with Wells Enterprises Inc., or any third parties, that permit us to receive vending machine and/or micro-market proceeds from operations taking place on Wells Enterprises Inc. premises as well as any other actions needed to end any other financial assistance provided by Wells to the Union.

WE WILL after the expiration of our current contract with Wells Enterprises Inc. ending on December 31, 2016, immediately cease serving as the collective-bargaining representative of Wells Enterprises Inc.' employees for the purpose of dealing with Wells concerning grievances, wages, rates of pay, hours of employment, or other terms or conditions of employment, unless and until such we are certified as the collective-bargaining representative after a Board election.

UNITED DAIRY WORKERS OF LE MARS

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